

Overlapping Discursive Terrains of Culture, Law and Women's Rights: An  
Exploratory Study on Legal Pluralism at Play in Pakistan.

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**Introduction**

This paper argues that plural regulatory frameworks ('laws' broadly defined) including religion, culture, customs, tradition as well as 'formal' law (national and international) informing women's human rights, collude to create and perpetuate gender hierarchies. Whilst 'informal' norms of culture, custom and tradition expressly advance this position, gender neutral laws adopted by the state and her institutions are suspect, as these too, operate within a male socio-legal and political environment. Using the example of Pakistan, the paper attempts to present the contours of an analytical framework for mounting a challenge to plural legal systems from the perspective of women's lived experiences and realities of their being.

**Culture, Law and Human Rights: Some Conceptual and Definitional Debates.**

Of the three inter connected norms: culture, law and human rights, conceptualizing and defining culture presents the greatest difficulty from a feminist perspective in post colonial and plural legal systems. Historically, culture is an evolutionary process of our 'beings' and 'doings'. It is an intricate tapestry that both reflects and detracts from collusions and resistances (individual and /or collective), to dominant behavioral norms in society at various points in our histories. Culture therefore is not a static, stagnant phenomenon. Whilst there remain some defining moments in histories of cultural norms, evolution with the passage of time is an integral element of all cultures. In attempting to define what norms constitute 'culture', it is important to

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remind ourselves of the highly political nature of this defining project: Who has the power to define culture determines whose voices are being heard and represented in this undertaking? Whose perspectives does a certain culture and custom represent? Is it inclusive of the 'being' and 'doing' of vulnerable and marginalized groups? What sections of society and communities become allies in this project and who constitute the adversary/adversaries? At what moment in our various histories does a custom become a customary 'law'? Potential responses to these questions form the beginnings of a counter-discourse on what is often portrayed as a rigid inflexible normative framework i.e., culture.

Within the context of Pakistan, it is relevant to include the narrative of 'formalisation' and fossilization of culture, custom and tradition of the 'natives' by British colonisers. This is evident from the Gazetteers of various regions of the sub continent of India. In order to make sense of the multiplicity of cultural norms informing the lives of the colonized, the British decided to 'write' down and 'record' culture in the form of Gazetteers. Officials traveled the length and breadth of the country, from village to village, gathering people to question them on what their culture was and compiling notes later published (as Gazetteers). The crucial question to pose here is: who were the participants and informants in these culture-gathering meetings? It was no doubt, the male elite, excluding working classes, minority groups and women. Women's concerns were obviously not taken into account. For months, men would continue to record what they thought constituted culture and it was this particular version of culture that became embedded in structures of the colonial state. Thus the "Gazetteer" became the new bible. The colonial state was obviously informed by its own Eurocentric and formalistic black letter approach to what constitutes a regulatory

norm. Black letter law derived from lived experiences of *some* people at a *certain* time in history, is totally incongruous with culture as a live, evolving and breathing organism growing with society through the ages. This crucial fact appeared to elude the rulers.

Different sections of society view custom, culture and laws based thereon differently; hence the importance of challenging and destabilizing the notion of fossilized culture. We must ponder upon the motive of the colonial agenda, whether it is Asia or Africa, where the indigenous cultures were undermined and communities encouraged to abandon these in favour of 'modern' legal constructs. For example, in rural Pakistan, the popularly accepted public space for women was the village well, stream or river known as the '*gudar*'<sup>1</sup> (source of water collection undertaken by women). In the early afternoon, most women in the village would set out from their homes with earthen water containers to collect water from the village well or spring/river nearby. Men would simply keep away from the routes taken by these women thus providing them with an opportunity to venture out into the public space with propriety and legitimacy. It also opened up spaces of socialisation for women who would otherwise remained confined within the four walls of their homes. This important 'women's space' was not recorded as a legitimate cultural norm and remained absent from colonial recordings of culture. On the contrary, what found a place in histories of culture, was that women stayed indoors and never ventured into the public space.

### **Formal law as a regulatory norm for women's lives.**

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<sup>1</sup> '*Gudar*' (Pushto/Pukhto word) meaning a stream, river or other water source where women went to collect water.

Laws are informed by culture, custom, religion and tradition and more recently by globalisation and international human rights norms. The objective of laws is, to achieve justice and equity, equally and without discrimination for all human beings irrespective of class, sex, colour, creed etc. On paper and in theory, this is what appears to be the wording of most legislation. Reality belies this objective because the effect of supposedly gender-neutral laws may not always be gender-neutral and equally favorable to all sections of society. I suggest that law is easy to manipulate and is often appropriated by the powerful in society and applied to their advantage. Experiences of male and elitist sections of society are reflected and represented in formal law and this is evident in numerous laws, in fact too numerous to recount. A few examples will suffice here. In the employment sector, a 9 am to 5pm job is a very male-oriented job construction and objective. Women, who are shouldering the responsibilities of caring for children and the elderly as well as other household tasks, thus become excluded. If they wish to enter the formal job market they have to 'behave' like a man and leave the house in the morning and return in the evening. Connected to this point is the fact that many women with caring responsibilities try to engage with the market by accepting part time jobs. But as is too well known, part time jobs are less well paid, bring little or no job security and no pension and holiday entitlements. This is an example of formal law as a spillover from the cultural framework and a product of the society and its socio-economic priorities.

A further point to bear in mind is the fact that formal law once adopted, develops an entrenched legitimacy and becomes difficult to dislodge and challenge. Periodic review of the effect of laws is hardly ever undertaken. Laws' violence is camouflaged under a mask of neutrality. (See discussion in sections below on

*Hudood, habeas corpus* etc) We must therefore refrain from romanticizing the law and be prepared to critique it in a robust manner. Law, as experienced by most women, is neither gender neutral nor is it value free. It is informed by other regulatory norms and these may not always be women friendly. Even if a law is framed in a gender-neutral manner, its application and enforcement is not gender-sensitive. Law is thus contested terrain and a discursive site for women's rights and struggles. But abandoning law is also not a preferred option. Law after all, commands legitimacy and power and can be used as an effective tool for women's empowerment and visibility.

**The third concept for exploration in this paper is the human rights discourse.**

This concept, seen by some as a panacea for all ills, is also problematic when employed for women in non-western, developing economies. Human rights treaties as well as formal laws including constitutional documents etc., call for all rights to be extended on a basis of equality and non-discrimination. Enforceability of these rights is dependent on effective institutional mechanisms for implementation. Whilst these frameworks are generally in place in developed economies of the western hemisphere, developing countries lack these or where present, are weak and ineffective. In the context of our present discussion, two issues arise: The first is the extent to which human rights law accord formal as opposed to substantive equality? It is assumed that human rights are a linear concept, when in practice and application, there are vertical and circular factors encompassing it. For instance, to imagine that a right to vote comes automatically and equally to both men and women as soon as it is placed in a formal law, is far from reality. Women require access to the election debates as well as the candidates they will choose from. Their male family members as well as the

wider communities need to 'permit' women to leave the home and to the polling stations to cast their vote. The right to vote is therefore not as easy for women as it is for men (although for men from marginalized communities and the landless and economically vulnerable, it is also difficult to exercise this right independently and autonomously).

Secondly, the hierarchical nature of human rights and its impact on women's human right, especially in plural legal systems. Every human right inscribed in human rights treaties and/or other documentation is not situated in a straight line, equal in priority, importance and enforceability. Human rights are hierarchical - one set of rights can cancel the other. For example, I have argued elsewhere<sup>2</sup> that there exists a normative conflict arising from the right to equality and non-discrimination as stated in UDHR, ICCPR, ICESCR, CEDAW and other human rights treaties and the right to freedom of religion and belief as enunciated in the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (the Religious Tolerance Declaration).<sup>3</sup> International human rights discourse appears to present both sets of rights as being at par, yet the practical implications are very different. Equality among the sexes can be perceived by many, as diametrically opposed to the right to practice one's religion as one perceives it. Thus where religious traditions have been interpreted to create gender hierarchies, the right to freedom of religion is said to legitimise these inequalities. Yet women's human rights under CEDAW pronounce complete equality among the sexes. A further complication arises due to the interface between customary norms and religious injunctions often resulting in the application

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<sup>2</sup> S.S.Ali & J.Rehman, "Freedom of Religion versus Equality in International Human Rights law: Conflicting Norms or Hierarchical Human Rights? (A case study of Pakistan)" (2003) 21 *Nordic Journal for Human Rights*, pp. 404-429.

<sup>3</sup> UN G.A. Res. 36/55, 36 UN GAOR Supp (No. 4) at 171, UN Doc. A/36/51 (1981).

of the most patriarchal and non-egalitarian face of religion. How do the constitution, law and courts in a legally pluralist jurisdiction such as Pakistan, confront and address the dilemma of human rights hierarchies? Is this a normative conflict-defying resolution or can the two be reconciled?

Women's human rights as set out in CEDAW, are based on a predominantly Western liberal feminist discourse that insists on individual rights of women to the exclusion of the multiplicity of her identities. Several writers argue that this approach is premised on a combination of law, modernisation theory, and Western liberal feminist jurisprudence.<sup>4</sup> The assumption is that there is an identifiable human nature which is at the heart of recognising appropriate rights to develop, protect and contain elements of this core human identity. Further, that underdevelopment and gender inequality in the Third World are caused by traditional values and traditional social structures. The prescription for attaining equality for women is therefore to address the human rights of women without reference to the cultural embeddedness of these rights in the Western liberal States. However, the question that is being posed by women around the world is: To what extent are the concepts of equality and non-discrimination cast within the Western liberal framework equally beneficial for all women? For example, the point has been made that in the African and Asian contexts most women rely on entitlements embodied in family and community relationships that do not relate to the "equal rights" language. Similarly, religion forms an important part of many women's identity. They are not comfortable with being asked to frame their identities within a discourse that is avowedly secular. Is the monolithic and individualistic concept of abstract equality able to meet the everyday needs of such women? Thus, despite its holistic approach toward questions of women's empowerment through human rights,

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<sup>4</sup> See, eg, H. Charlesworth, C. Chinkin and S. Wright: "Feminist Approaches to International Law" (1991) 85 *American Journal of International Law* p. 613; and A. Hellum, *Women's Human Rights and Legal Pluralism in Africa* (1999) Oslo: Tano Aschehoug p. 412.

CEDAW is not entirely successful in providing a clear methodology to resolve these conflicting rights.

CEDAW is undoubtedly a huge milestone in attaining equality for women. The Convention nevertheless has its weaknesses, and its substantive provisions are emasculated by a range of reservations – many of these based on the apparent incompatibility with religious norms and beliefs. Islamic States have relied upon their construction of the *Shari'a* to enter reservations to the Convention, although there are inconsistencies and contradictions in these practices. Thus some Islamic States accept the provisions of the Conventions, whereas others have objected to several provisions on the basis that these conflict with the *Sharia*.

A balance may be achieved by going beyond a mechanical reading of equal rights for women in international human rights law, assessing critically the evolutionary journey traversed by the concept of 'equality' and 'non-discrimination' since it was first introduced into international human rights documents. In the initial stages of application, 'equality' and non-discrimination was generally interpreted in formal legalistic terms on the premise that by making that statement in law, equality and non-discrimination would follow in practice. This interpretation and manifestation of the concept was flawed on a number of counts. Equality was perceived and defined as being like a man. As Catherine Mackinnon writes, "man has become the measure of all things." Over the decades and with inputs from human rights scholars, activists, human rights treaty bodies and domestic courts, the non-discrimination norm and equality has achieved a more nuanced and sophisticated position. It now includes within its meaning the interconnectedness of various human rights to give it substantive content. Equal rights to health, employment and education may imply different and unequal measures – in order to arrive at equal access for all. Where the



norm remains to be developed and firmed up is in the area of allocation of resources, both human and material. Most importantly measures such as gender budgeting need to be introduced as an integral component of any planning, monitoring and evaluation aspects of government projects.

Men and women start the race for equal rights from totally different starting points. There prevails deep inter connectivity and inter relation between civil and political rights (the issue of non-discrimination and equal access both as women belonging to majority and minority communities), with economic social and cultural rights (safe transport for women to access an educational institution, a health facility and the workplace or simply access to a toilet within the public space).<sup>5</sup> Women's disadvantages are often based on structural injustice and rethinking human rights through innovative applicatory mechanisms, may afford opportunities to address those structural injustices and make women's human rights a reality.

### **Plural Legalities and Gendered Realities: Legal Pluralism in Action**

Within this complex and fluid environment, there is evidence of evolving plural legalities and gendered realities and a glimmer of hope for women. For example in the public sphere in employment cases, there appears a robust articulation of the equality and non-discrimination norm. A string of cases from the superior courts of Pakistan depict this trend.

In a legally pluralistic jurisdiction such as Pakistan, norms informing the legal system are varied and at times in conflict. The first and foremost issue in our discussion of the equal rights provisions in the constitution therefore, is the concept of equality

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<sup>5</sup> S.S.Ali, "Where is the Toilet? Getting Down to Basics in Accessing Women's Rights" in A. Hellum, S. S. Ali, J. Stewart & A. Tsanga (eds.) *Paths are Made By Walking* (forthcoming 2006)

itself and its interpretation by courts. The superior judiciary in Pakistan has applied article 25 to promote equality between men and women, as well as by using it in conjunction with other provisions of the constitution to advance this equality.<sup>6</sup> Litigation in the area has arisen due to a literal and narrow interpretation of affirmative action measures mitigating against the equality article (25) of the constitution.<sup>7</sup>

The case of *Shrin Munir v. Government of Punjab*,<sup>8</sup> is a major landmark in the area. The petition arose when girl students applying to medical colleges in Punjab were denied admission to these institutions on the basis that seats reserved for them as an affirmative action measure were filled up. Therefore, even though on merit, these girl students were entitled to places, the same were given to male students on the plea that girl students were only entitled to seats reserved for them and no more. The girls' plea was that this was a violation of article 25 of the constitution, as well as a misapplication of the affirmative action measures outlined in the constitution. Their Lordships declared in very clear terms that:

“Clause (2) of article 25 prohibits distinction on the basis of sex alone. However, the very next clause (3) controls the rest of article 25 by providing that “nothing in this article shall prevent the State from enacting any special provision for the protection of women and children.” It implies, therefore, that while the difference on the basis of sex can be created and maintained, it shall be done only in those cases

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<sup>6</sup> In addition to article 25, there exist a number of other constitutional provisions permitting the State to adopt affirmative action measures assisting women to achieve meaningful equality with men. These include, *inter alia*, articles 26; 27; 32; 34; and 37.

<sup>7</sup> For example, where ‘special’ quota of seats were reserved for female students in medical colleges, and female applicants exceeded this quota and were able to get places in ‘open’ competition with their male colleagues, a narrow interpretation resulted in denying the female applicants places beyond the fixed quota.

<sup>8</sup> PLD 1990 SC 295.

where it operates favourably as a protective measure for and not against women and children. The field of prohibition, of adopting sex, as a criteria for making a distinction, is thereby reduced to only that category wherein sex is adopted as a standard for discriminating against females generally and against males only if it is not as a measure protective of females..... In interpreting the constitution and also in giving effect to the various legislative measures, one distinction has to be consistently kept in view and it is that classification based on reasonable considerations is permissible and not violative of the principle.”<sup>9</sup>

The *Shrin Munir* case, had as its precursor, the case entitled *Mussarat Uzma Usmani etc. v. Government of Punjab*.<sup>10</sup> This was similar in nature to the *Shrin Munir* case and A. S. Salaam, J., as he was then, while declaring restrictions placed upon girl students to compete on open merit seats as illegal/invalid, interpreted article 25 of the constitution of Pakistan in the following words:

“The provision is clear, categorical and unambiguous altogether. It laid down that all are equal, there shall be no discrimination on the basis of sex alone and that the State may make law for the protection of women. All are equal, man and woman, neither man nor woman shall be discriminated against; laws may be made for the protection of women - not against them. How are the (girls) petitioners being treated equally when they were being denied admission even though they have nearly hundred marks more than the boys? Are they not being

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<sup>9</sup> *Shrin Munir v. Government of Punjab*, PLD 1990 SC 295 at p. 309.

<sup>10</sup> PLD 1987 Lah. 178.

discriminated against only because they are girls? If they were boys with these marks they would have been given admission....”<sup>11</sup>

*Naseem Firdous v. Punjab Small Industries Corporation*,<sup>12</sup> tested the application of the equality norm laid out in article 25 of the constitution of Pakistan in conjunction with article 27 that safeguards against discrimination in services. In this case, the petitioner, already employed by the Punjab Small Industries Corporation in 1977 and promoted to the position of Assistant Director (Design) in 1983 was prevented from applying for the position of designer in the same department as the advertisement was restricted to ‘male only’ applicants. The plea of the employers was that the position of designer was essentially a ‘male’ job; this statement was made regardless of the fact that the petitioner, a woman was already performing that very job for close to a decade. The court declared the justification of article 27 as conflicting with the equality article of the constitution and hence invalid/illegal.

In the *Shirin Dokht* case the Sindh High Court was approached by an Air Hostess who challenged regulation 25 of the Pakistan International Airlines Corporation Employees (Service and Discipline) Regulations 1985. Under this provision an Air Hostess was to retire on attaining the age of thirty five years extended from time to time to forty five whereas their male colleagues in pay groups I to IV would retire at the age of sixty. The Sindh High Court declared this provision *ultra vires* of the constitution of Pakistan and decided in her favour.<sup>13</sup> The Court held that the action of respondents was in clear violation of Articles 25 and 27 of the constitution as both the articles guarantee equal protection and equality before law irrespective of sex

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<sup>11</sup> *Ibid.*

<sup>12</sup> PLD 1995 Lah. 584.

<sup>13</sup> *Shirin Dokht v. Government of Pakistan* 1995 PLC (C.S)251

and provide safeguard against discrimination in services. Despite this decision (confirmed on appeal by the Supreme Court of Pakistan), regulation 25 continued to be in operation until it was struck down again by the Supreme Court in *Pakistan International Airlines Corporation through Chairman and others v. Samina Masood and others*.<sup>14</sup> The Supreme Court upheld equality for women in the workplace by stating:

“ What we are practically confronted with is proved, rather admitted situation, that cabin crew consisting of male stewards and female Air Hostesses are in one and the same group performing exactly the same duties. Though belonging to the same category yet being differently treated, is not a distinction based on intelligible differential but clearly is a distinction based on sex. In the same functional group performing the same duties and belonging to the same pay group, the retirement age of Air Hostesses being fixed differently is nothing but discrimination resorted to for the only reason that they are females. What learned counsel for the petitioner called an intelligible differentia is nothing but a differentia based on sex, glaringly offending the provisions of Article 25 (2) of the Constitution. We believe, nothing could be a discrimination based on sex, better than what we have found in the present case. . . .” (p. 841).

Compared to the positive and women friendly judgment in employment cases identified above, cases in the area of family law or personal status have experienced a tortuous and chequered course. For instance the Saima Waheed case and others where customary practices and prevalent social norms appeared to rule the courtroom

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<sup>14</sup> PLD 2005 SC 831

environment. An inflexible interpretative discourse based on the religious text coloured by a patriarchal and misogynist perspective was clearly visible.

*Saima Waheed*, an adult Muslim woman<sup>15</sup> contracted a marriage without the knowledge or approval of her parents in the beginning of 1996, though she continued to reside with her parents. Her father, on hearing of the clandestine union, strongly disapproved, returned the *nikahnama*, or marriage certificate and purported to cancel it. Saima Waheed, in defiance of her family's wishes to end what they considered an undesirable match, however, left the family home and took up residence in a women's refuge managed by a non-governmental organisation. Her father, immediately filed criminal charges against the refuge, alleging that his daughter had been abducted, and also argued that Saima's marriage was void *ab initio*, since he, the *wali*, had not given his consent.

Saima, in turn, petitioned the court for a declaration upholding her marriage. The case attracted intense and widespread media attention both at home and internationally. During the pendency of the petitions, the Chief Justice of the Lahore High Court referred the case to a larger bench of the Lahore High Court. Issues raised in the petition included, *inter alia*:

(i) whether parents have a right to be obeyed, and whether this right of obedience is judicially enforceable; (ii) whether marriage in Islam is a civil contract or not; and (iii) whether permission of the *wali* is or is not one of the main condition of a valid *nikah* (contract of marriage).

The case not only re-opened a debate that one believed to have been well-settled for centuries, at least among Hanafi Sunni Muslims, it has also called into question the entire legal personality of a Muslim woman and rights accorded to her in Islam. The

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<sup>15</sup> And an undergraduate student at the Government College for Women, Lahore (Pakistan).

*Saima Waheed* case illustrates the wide ranging controversies surrounding the institution of marriage, and by extension the position of women in Islam. Legal issues raised in the petition were subsumed in and discussed more in the light of prevailing customary norms than legal reasoning. The case was decided by majority decision in favour of Saima. The dissenting Judge, Ihsan-ul Haq Chaudhary presented a number of reasons, according to his view of Islamic society, for holding that marriage in Islam was indeed a sacrament and not a civil contract; that rights of parents in this regard were legally enforceable and, that an adult Muslim woman could not enter into a valid contract of marriage without the intervention of her male guardian. A prime example of this line of argument presents itself in His Lordship's judgment when commenting upon Dr. Tanzeelur Rehman's Code of Muslim Personal Laws, Vol. I. Dr. Rehman argues that "A major Muslim male or female can marry without intervention of the guardian". To this His Lordship responds in a rather harsh tone:

"We are national judges and as such custodians of the morals of the citizens, therefore it is not possible to subscribe to the opinion expressed by Dr. Tanzeel ur Rehman",<sup>16</sup> inferring therefore that Dr. Tanzeelur Rehman by accepting the right of a Muslim woman to contract marriage was somehow promoting immoral views. In fact,<sup>17</sup> the learned judge appeared to be making out a strong case for accepting customary practices as the overriding sources of law. To this end, His Lordship laid out the social ceremony of marriage in great detail and presented it as a substitute for legal requirements of marriage. Thus he appears to believe that as an essential to a valid marriage, the woman's family must arrange an assembly for the *nikah* ceremony to which friends and family must be invited. That the proposal and acceptance (*ejab-*

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<sup>16</sup> At p. 54 A of judgement.

<sup>17</sup> *Ibid.*, at pp. 10-12.

*o-qabool*) must be made in this assembly convened by the woman's family, that with the permission of the *wali*, the woman will give her consent and, the contracting party to the marriage will be the *wali* and not the woman herself. His Lordship placed marriage in Islam in the category of *ibadaat*, a *sunnah* of the Prophet Mohammed, and at best, as a social contract. He also denied that dower was consideration for the marriage but that it was a gift of free will to the wife. He also argued that *ejab-o-qabool* does not constitute a valid contract of marriage.<sup>18</sup>

In response to this description, I suggest that marriage ceremonials and rituals vary from one society to another. What is important is the legal requirements constituting a valid contract of marriage. Losing sight of this reality in the maze of diverse societal norms will not bode well either for legal development in Islamic jurisprudence, or the position accorded to women in Islam. While making the above statements, one wonders whether His Lordship was aware of a centuries old Pukhtun custom where *nikah* assembly is gathered at the bridegroom's home, and *nikah* itself is solemnised after the bride (yet unwed in legal terms), is taken to her new home.

The above examples of judicial perceptions on women's status and rights in light of culture and religious frameworks is what I would describe as "fractured modernity" of the post-colonial schizophrenic personality of the state and her institutions. It presents an image of equality through the constitution and most other formal laws. But as we move down the continuum of laws impacting our lives, the fractured lines appear and we can see patriarchal norms, undermining women's rights. There is no clear line dividing these plural legal systems; they merge and mesh with each other. The

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<sup>18</sup> *Ibid.*, p. 8.



constitutional equality presented to women as their unqualified right is undermined by the hudood laws framed in the name of religion as do the inheritance rights of women in Islam. The pretence of equality for all becomes progressively dimmer and more ambiguous as we negotiate the jagged lines of this fractured modernity. By the time we arrive at our destination on the ground i.e., within communities, patriarchal culture reigns supreme. Holding a mirror to communities in the name of the constitution of Pakistan or other legalities that offer space for women's rights becomes remote and irrelevant.

**Legacies of common law: Alliances of colonial and post-colonial law and laws' violence on women.**

A stark manifestation of the fractured modernity of postcolonial states is evident in the alliances between a variety of formal laws, both secular and 'religious'. Laws, irrespective of their source and origin are manipulated by private persons and facilitated by the state and her institutions to control women's sexuality and autonomy. I share here lessons from a survey of case law under the Hudood Ordinance (relating to zina) and the writ of habeas corpus meant to safeguard illegal arrest and detention.

In the pre-hudood law (prior to 1979), the writ of *habeas corpus* was used to seek the support of the state to recover persons (mostly women). This law was used in conjunction with criminal law provisions addressing abduction, kidnapping, rape. Factually, these cases were either to recover a woman who had exercised her choice of marriage with a man not agreeable to her natal family, or where married women had ran away from home with a man of their choice. (Genuine kidnappings and abductions are not being ruled out here, but the point being made is that the vast majority of cases of *habeas corpus* consisted of relatives seeking rebellious women

back into the family fold). The state, despite its acceptance of adult women's right to marry men of their choice, colluded with customary norms and the dominant voice of culture to undermine other regulatory norms recognizing women as *sui juris*.

The post-hudood scenario is no different. Here, *habeas corpus* continues to provide a supporting hand to the hudood laws. There has not been a single case where the hudood law has not been invoked in conjunction with habeas corpus. 'Culture' is now being carried out in the legitimate space of the courtroom. However, a more encouraging picture is emerging since the 1990s, where the judiciary, has handed down judgments that clearly tried to undermine collusion of hudood and *habeas corpus*. Killing in the name of honor has now far less validity as an argument.

The single most startling 'revelation' of this research has been the fact that the vast majority of cases registered under *hudood* laws of *zina* and *zina bil jabr*, are based on personal and ulterior motives of near relatives. First Investigation Reports (FIRs) are usually fabricated and meant to achieve personal objectives. In most cases, evidence is doctored and constructed, in collaboration with investigation agencies (in this case, invariably local police). These cases are indicative of laws' violence in the hands of individuals and groups who appropriate and employ them in playing out 'battles' of often 'localised' power relations. Case law is reflective of how the religious text is abused and misused without any qualms of conscience. The distinction between employing 'secular' laws and religious law is completely blurred. Some examples of this approach are presented below:

*Mst. Humaira Mehmood vs. The State* PLD 1999 Lah 494, is a case of alleged *zina* and abduction registered by a father against the husband of his daughter as she had married a man of her own choice. The father knew, at the time of his complaint, that his daughter and the accused are lawfully married but went ahead and filed a case of *zina* implicating his daughter and her husband as a result of which they had to flee their home to avoid being arrested. Details are as follows: Humaira, a 30 year old woman married Mehmood Butt, against the wishes of her parents. Her father was a sitting member of the Provincial Legislature. The couple, apprehensive of their lives and safety, fled to Karachi and sought refuge in Edhi Centre.<sup>1</sup> The brother chased them and filed a first information report (FIR) to the effect that his sister had had a row with her mother and left home and he may be given her ‘possession’. There was no mention of an existing marriage of Humaira to another man or her alleged abduction by her husband Mehmood. The family, on ‘recovering’ Humaira went through a ‘false’ marriage ceremony which they documented on video film and later produced in court as testimony of a prior marriage to a person of the family’s choice. The case, through the support of human rights activists made it to the High Court of Lahore invoking the writ jurisdiction under constitution of Pakistan (Article 199). The judgment by the Honourable Justice Jilani is a landmark decision and important in more ways than one. It draws strength from a combination of Islamic law, the constitution of Pakistan and international human rights instruments emanating both from the UN human rights regime and comparable documents from Islamic forums. What is also crucial in developing a women-friendly and indeed human friendly interpretative strategy for securing human rights is the complementary manner in which these three different legal frameworks are used. (Pages 512 –513 of the judgment sum up this argument and approach rather well.)

His Lordship emphasises the duty of the state institutions in respecting, protecting and promoting fundamental rights of everyone. He States that:

“Coming to the role of the State functionaries in this case I find that the police officials who handled this case passed orders and acted in a manner which betrayed total disregard of law and the land and mandate of their calling. Articles 4 and 25 of the Constitution of the Islamic Republic of Pakistan guarantees that everybody shall be treated strictly in accordance with law. Article 35 of the Constitution provides that the State shall protect the marriage, the family, the mother and the child. As Member of the international Comity of Nations we must respect the International Instruments of Human Rights to which we are a party.”

His Lordship reminds the parties that Pakistan is a Member of United Nations and is signatory to the Convention of the Elimination of all Forms of Discrimination Against Women. He especially draws attention to article 16 which enjoins all member states to respect rights of women to family life on a basis of equality with men. Justice Jillani also refers to article 5 of the Cairo Declaration on Human Rights in Islam to reinforce his argument of women’s human rights within an Islamic framework. He condemned in no uncertain language the ‘alliance’ of state, society and family to undermine women’s human rights by stating that:

“The police officials are guardians of the lives, liberties and the honour of the citizens. They owe their place in society to the taxes which are paid by citizens. If these guards become poachers then no society and no State can have even a semblance of human rights and rule of law.”

Likewise, in *Muhammad Siddique vs. The State* court upheld the conviction of a father who had murdered his daughter, her husband and their infant child to teach his daughter a lesson for marrying of her own free choice. The court severely criticizes such tendencies and social trends. Justice Jilani in his judgment states thus:

“These killings are carried out in an evangelistic spirit. Little do these zealots know that there is nothing religious about it and nothing honourable either. It is male chauvinism and gender bias at their worst. These prejudices are not country specific, region specific or people specific. The roots are rather old and violence against women has been a recurrent phenomenon in human history..... Notwithstanding the Quranic commandments and the penal law of the land, the incidents of violence against women remain unabated. . . . This is a typical example of misuse and misapplication of the Hudood laws in the country. . . . A murder in the name of honour is not merely the physical elimination of a man or woman. It is at a social-political plane a blow to the concept of a free dynamic and egalitarian society. In great majority of cases, behind it at play, is a certain mental outlook, and a creed which seeks to deprive equal rights to women i.e., inter alia, the right to marry or the right to divorce which are recognized not only by our religion but have been protected in law and enshrined in our constitution.”

The above judgments sum up the argument regarding fractured modernity in post colonial states. In this plural legal system, human rights treaties appear to be invoked by the judiciary as effortlessly as customary and Islamic norms as well as constitutional provisions of equality and non-discrimination.

### **Unpacking Legal Pluralism: Looking Forward**

The discussion in this paper advances the view that in plural legal systems, multiple regulatory norms operate under the overarching umbrella of the state and her institutions. We operate in societies where devolution of power to communities on the one hand, and globalization on the other, works in tandem with highly centralized state structures and institutions. In a discussion of women's rights, this development too, needs to be problematized. The state is an abstract entity but governments universally articulate a complex ideology and presence informed by a range of norms including custom, culture, religion as well as formal laws. In Pakistan, the state is essentially a post-colonial state which encompasses within it, the colonial legacy of common law as well as other norms identified above. But, in this environment of fractured modernity, cultural violence or religious norms are not being inflicted within informal communities. On the contrary, legitimacy for cultural practices adverse to women and in violation of fundamental rights of the constitution and human rights treaties is achieved through and within state institutions. There exists therefore the need to appropriate the human rights discourse and make it one's own by contributing women's concerns into the debate and strategy.

It is also noted that a structural and institutional embeddedness of unequal gender relations within the public and private sphere makes it difficult for women to engage in public discourse of life. This institutional embeddedness is such that it is not prepared either physically or psychologically to accommodate women's bodies in the public sphere. We have been told for centuries that women's bodies in the public sphere are the problem. It is the invisible visibility of this problematic that is a huge issue for women and the society and is part of our psyche. The State is supposed to

be neutral but it is not prepared to be so. For example, in public transport, women have only two small seats in front next to the driver. All men occupy seats in the back which automatically become the domain of the male. Women are never seen sitting in the back seats and this shrinks the 'acceptable' public space for women.

Formal law of equal treatment is held hostage to informal law, be it in the public domain of the market space, in offices and education and health facilities or in the courtroom.

In conclusion, I would emphasize the need to raise these issues and connect them to the norms of the society we live in as well as the norms of democracy. We need to pose the question: are women's voices being heard as part of the democracy we aspire to usher? With the revival of local government, have women's voices been included or have their voices and concerns been muffled by customary and elitist norms of silencing the vulnerable? Has devolution strengthened patriarchal norms, rejuvenated caste/class/jirga/panchayat hold or, has women's presence in these institutions, challenged an all male enunciation of culture, law and women's rights? We require documentation of cases and scenarios as well as discourses. How are communities responding/ Is the transition towards democracy women friendly? What sort of democracy are we moving towards, if at all? In other words, has women's participation in local and national political structures changed the discourse and challenged the status quo? These questions require exploration and resolution at the level of our communities otherwise substantive equality will continue to evade the millions of women of our region.

## **Bibliography**

P. Baxi, S. M. Rai and S. S. Ali, Legacies of Common Law: “Crimes of Honour” in India and Pakistan (2006) Vol. 27 *Third World Quarterly*

S.S.Ali, & J. Rehman, “Freedom of Religion versus Equality in International Human Rights law: Conflicting Norms or Hierarchical Human Rights? (A case study of Pakistan)” (2003) 21 *Nordic Journal of Human Rights* 404.

H. Charlesworth, C. Chinkin & S. Wright, “Feminist Approaches to International Law” (1991) 85 *American Journal of International Law* 613.

A.Hellum, *Women’s Human Rights and Legal Pluralism in Africa* (1999) Oslo: Tano Aschehoug.

S. S. Ali, “Where is the Toilet? Getting Down to Basics in Accessing Women’s Rights” in A. Hellum, S. S. Ali, J. Stewart & A. Tsanga (eds.) *Paths are Made By Walking. Intersecting Plural Legalities and Gendered Realities* (2006) Weaver Books (forthcoming)

S. S. Ali, *Gender and Human Rights in Islam and International Law. Equal Before Allah, Unequal before Man?* (2000) The Hague: Kluwer Law International.

Cases:

*Shrin Munir vs. Government of Punjab* PLD 1990 SC 295

*Mussarat Uzma Usmani vs. Government of Punjab* PLD 1987 Lah. 187

*Naseem Firdous vs. Punjab Small Industries Corporation* PLD 1995 Lah. 584

*Shirin Dokht vs. Government of Pakistan* 1995 PLC (C.S.) 251



*Pakistan International Airlines Corporation through Chairman and others vs. Samina*

*Masood and others* PLD 2005 SC 831

*Mst. Humaira Mehmood vs. The State* PLD 1999 Lah. 494

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<sup>i</sup> The Edhi Trust is a national welfare organization. Abdus Sattar Edhi established his first welfare centre and then the Edhi Trust with a mere Rs. 5000 (less than 50 pounds sterling). What started as a one-man show operating from a single room in Karachi is now the Edhi Foundation, the largest welfare organisation in Pakistan. The foundation has over 300 centres across the country, in big cities, small towns and remote rural areas, providing medical aid, family planning and emergency assistance. They own air ambulances, providing quick access to far-flung areas.